

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

ENTERGY NUCLEAR VERMONT  
YANKEE, LLC and ENTERGY  
NUCLEAR OPERATIONS, INC.

Plaintiffs,

v.

Civil Action No. 11-cv-99

PETER SHUMLIN, in his official capacity  
as GOVERNOR OF THE STATE OF  
VERMONT; WILLIAM H. SORRELL,  
as ATTORNEY GENERAL OF THE  
STATE OF VERMONT; and JAMES  
VOLZ, JOHN BURKE, and DAVID  
COEN, in their official capacities as  
members of THE VERMONT PUBLIC  
SERVICE BOARD

Defendants.

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**PRETRIAL MEMORANDUM OF LAW OF VERMONT NATURAL RESOURCES  
COUNCIL AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS**

The Vermont Natural Resources Council ("VNRC"), amicus curiae-applicant in the above captioned proceeding, submits this memorandum of law in support of Defendants' authority to regulate nuclear power in Vermont for energy planning purposes. No person other than the amicus curiae-applicant or its members contributed money that was intended to fund preparing or submitting this memorandum.

**Introduction**

This memorandum provides a review of energy legislation, enacted with the support of VNRC and many Vermonters, which shows that planning Vermont's energy future is one of the

primary purposes for the State's regulation of the nuclear facility owned and operated by Entergy Nuclear Vermont Yankee ("ENVY") pursuant to Act 74 and Act 160. Specifically, this memorandum establishes that (1) energy planning is a non-preempted basis for regulating nuclear power, (2) energy planning is one of the primary purposes for the enactment of Acts 74 and 160, and (3) to the extent this Court looks beyond the stated planning purposes of Acts 74 and 160 to determine legislative intent, the best evidence of such intent is the General Assembly's consistent purpose, expressed in related energy planning legislation with the strong support of renewable energy advocates and many Vermonters, to transition Vermont to renewable energy.

**I. Energy planning is a non-preempted basis for state regulation of the relicensing of nuclear power facilities.**

Federal law clearly authorizes the State of Vermont to consider energy planning when deciding whether to approve ENVY's operation of the Vermont Yankee plant beyond March 21, 2012. The analysis starts with the Atomic Energy Act, which includes savings clauses that preserve the authority of states to regulate nuclear power plants for any purpose other than radiological safety. Specifically, section 274(k) of the Act states:

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U.S.C. § 2021(k).<sup>1</sup> In construing the Act, the United States Supreme Court held that the Act's saving clauses set up a framework for dual regulation of nuclear power plants by the federal

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<sup>1</sup> See also, section 271 of the Act, which provides, "Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power produced through the use of facilities licensed by the Commission: Provided, That this section shall not be deemed to confer upon any Federal, State or local agency any authority to regulate, control, or restrict any activities of the Commission." 42 U.S.C. § 2018. Significantly, the Department of Justice has decided not to

government and states in which such facilities are located. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 211 (1983). Thus, while the Nuclear Regulatory Commission (“NRC”) regulates nuclear plants for the narrow purpose of ensuring a facility’s compliance with federal radiation hazard regulations, “States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.” *Id.* at 205. The Supreme Court further emphasized that “States exercise their traditional authority over the need for additional generating capacity, *the type of generating facilities to be licensed*, land use, ratemaking, and the like.” *Id.* at 212 (emphasis added). The Court thus recognized that energy planning is a legitimate purpose for state regulation of nuclear power plants.

Furthermore, the NRC’s interpretations of the Act as it relates to relicensing are unequivocal in their acknowledgement of state jurisdiction over nuclear facilities for the purpose of energy planning. In 2006 the NRC recognized the decision-making authority of states in relicensing proceedings when it stated,

“It is possible that a license renewal application could satisfy the NRC’s safety and environmental reviews and still not operate. This because *the NRC does not have a role in the energy-planning decisions of state regulators and licensee officials.*”

Kolber Decl. (May 23, 2011) Ex. 1 (NRC, Final Report (“Final FAQs for License Renewal” March 2006)), at 1-7 (emphasis added).<sup>2</sup>

More recently, the NRC acknowledged Vermont’s authority over ENVY’s plant (and also directly addressed the issue now before this Court) in its supplemental NEPA statement for

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intervene in this proceeding on behalf of the Nuclear Regulatory Commission to challenge Vermont’s exercise of its authority over ENVY’s facility pursuant to Act 74 and Act 160.

<sup>2</sup> The NRC’s interpretations of the AEA are entitled to substantial deference. *See, e.g., Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 58-59 (2d Cir. 2004) (*Chevron* deference appropriate for formal agency adjudications and notice-and-comment rulemaking, and for less formal agency statements under defined circumstances).

the facility's license renewal when it declared "the NRC does not have a role in the energy-planning decisions of State regulators and utility officials as to whether a particular nuclear power plant should continue to operate." Kolber Ex. 3 (NUREG-1437, Supplement 30 (August 2007)), at 1-9. Thus, Vermont has the clear authority to regulate ENVY's plant, including making the final decision for energy planning purposes on whether to grant approval of a certificate of public good ("CPG") for continued operation of the facility.

**II. Energy planning, with a focus on transitioning Vermont's power supply to renewable resources, was a primary purpose for the Legislature's enactment of Acts 74 and 160.**

Vermont exercised its traditional authority over energy planning in its regulation of ENVY's facility through legislation governing applications for renewal of CPGs for nuclear power plants. The Vermont Legislature relied on that traditional authority when it enacted Act 74 and Act 160 with the express intent to continue an existing policy of energy planning with a focus on transitioning to renewable energy resources.<sup>3</sup> As such, ENVY cannot overcome the presumption that the State of Vermont enacted Acts 74 and 160 for the non-preempted purpose of energy planning. *See Wyeth v. Levine*, 555 U.S. 555 (2009); *Pacific Gas*, 461 U.S. at 206; *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 93 (2d Cir. 2006).

Act 74 finds that the State "needs to accelerate Vermont's investment in electricity resources that are economically and environmentally sound and that can be acquired in modest increments" in order to make a smooth transition to a diverse, reliable, economically sound and environmentally sustainable power supply. 2005 Acts & Resolves No. 74 § 2 (Findings), as

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<sup>3</sup> As part of that transition, in 2003 the General Assembly expressly excluded nuclear power from the definition of "renewable energy." Section 1 of Act 69 provides, "'Renewable energy' means energy produced using a technology that relies on a resource that is being consumed at a harvest rate at or below its natural regeneration rate... (B) For the purposes of this subdivision (2), *no form of nuclear fuel shall be considered renewable.*" 30 V.S.A. § 8002(2) (emphasis added).



codified at Vt. State. Ann. tit. 10, § 6521. The Legislature expressly notes that its goal for accelerating development of new sustainable power sources continues an existing policy of providing significant support for renewable resources and accelerating investment in renewable projects. *Id.* Act 74 further finds that “[t]here is great value in investing in renewable energy resources, efficient, combined heat and power sources, and energy efficiency,” and that “there is a need for a clean energy development fund to support investment in clean energy resources in order to permit adequate power supply diversity.” *Id.* The Act created the Clean Energy Development Fund and directed that the specific “purposes of the fund shall be to promote the development and deployment of cost-effective and environmentally sustainable electric power resources, for the long-term benefit of Vermont electric consumers, *primarily with respect to renewable energy resources*, and the use of combined heat and power technologies.” *Id.* as codified at Vt. State. Ann. tit. 10, § 6523(c) (emphasis added).<sup>4</sup>

Continuing the focus on energy planning expressed in Act 74, Act 160’s first finding states that “[i]t remains the policy of the state” to allow operation of a nuclear power plant in Vermont only with approval of the General Assembly after full deliberation of pertinent factors, including the “*choice of power sources among various alternatives.*” 2006 Acts & Resolves No. 160 § 1 (Legislative Policy and Purpose) (emphasis added).<sup>5</sup> Act 160 then requires that, prior to

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<sup>4</sup> The Legislature reaffirmed its priority for promoting renewable energy resources in Act 45 of 2009, described in more detail in section III.A of this memorandum. Act 45 provides in relevant part, “The purposes of the fund shall be to promote the development and deployment of cost-effective and environmentally sustainable electric power... *primarily with respect to renewable energy resources*, and the use of combined heat and power technologies.” 2009 Acts & Resolves No. 45, § 5, amending 30 V.S.A. § 6523(c) (emphasis added).

<sup>5</sup> Section 1(a) of Act 160 provides in full, “It remains the policy of the state that a nuclear energy generating plant may be operated in Vermont only with the explicit approval of the General Assembly expressed in law after full, open, and informed public deliberation and discussion with respect to pertinent factors, including the state’s need for power, the economics and

deciding on renewal of a nuclear power plant's CPG, the State must undertake studies to assess, among other factors, "all practical alternatives to those set forth in the applicant's petition that may be more cost-effective or *that otherwise may better promote the general welfare.*" *Id.*, § 4, as codified at Vt. State. Ann. tit. 30, § 254(b)(1)(C) (emphasis added).<sup>6</sup>

As shown by their express language, Act 74 and 160 were enacted as part of Vermont's overall policy goal of transitioning the State to substantially greater use of renewable energy resources.<sup>7</sup> The Supreme Court has left no doubt how courts should interpret such clear

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environmental impacts of long-term storage of nuclear waste, *and choice of power sources among various alternatives.*" *Id.* at § 1(a) (emphasis added). It is worth noting that Act 74 was enacted within two weeks of Act 208 (titled "The Vermont Energy Security and Reliability Act") which required the Department of Public Service and the Legislature's joint energy committee to develop and implement "a comprehensive statewide public engagement process on energy planning, focused on electric energy supply choices facing the state beginning in 2012. 2005 Acts & Resolves No. 208, § 2.

<sup>6</sup> Act 61, titled "An Act Related to Renewable Energy, Efficiency, Transmission, and Vermont's Energy Future, and also enacted in 2005, updated the State's Renewable Energy Goals by stating in relevant part:

The General Assembly finds it in the interest of the people of the state to promote the state energy policy established in section 202a of this title by:

(1) Balancing the benefits, lifetime costs, and rates of the state's overall energy portfolio to ensure that to the greatest extent possible the economic benefits of renewable energy in the state flow to the Vermont economy in general, and to the rate paying citizens of the state in particular.

(2) *Supporting the development of renewable energy and related planned industries in Vermont, in particular, while retaining and supporting existing renewable energy infrastructure.*

2005 Acts & Resolves No. 61, § 1 (emphasis added).

<sup>7</sup> VNRC concurs with the State's argument that any challenge to Act 189's requirement for a reliability audit of ENVY's facility is moot. State's Brief in Opposition to Motion for Preliminary Injunction at 14, n. 6 (May 23, 2011). However, to the extent that this Court considers the express purposes set forth in other energy legislation, the finding in Act 189 further demonstrates the General Assembly's consistent focus on energy planning with the Act's language addressing economics and reliability. Specifically, Act 189 provides in relevant part, "in 2007 [ENVY] experienced two operational difficulties that required that it reduce power or go to zero power production. *When a station reduces power output or does not produce power, Vermont utilities have to purchase market power, often at a greater price to our citizens. It is in*

language, emphasizing, “[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (citations omitted). The Court further directed “[w]hen the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Id.* at 254, quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981).<sup>8</sup> Accordingly, based on the specific language in Acts 74 and 160 alone, this Court could end its inquiry here and hold that these statutes are not preempted because they implement regulation of ENVY’s facility for energy planning purposes.

However, if the Court seeks further confirmation of legislative intent, the best evidence is the stated findings, purposes and substantive requirements in related energy statutes, and all of that evidence points to a consistent priority for comprehensive energy planning as one of the General Assembly’s primary purposes for energy legislation in Vermont. The express legislative purposes and directives voted into law by the full General Assembly, especially with the strong support of advocates for renewable energy and many Vermonters, are far more reliable indicators of legislative intent than the random statements by individual legislators on which ENVY relies. *Cf.*, *United States v. O’Brien*, 391 U.S. 367, 384 (1968) (declining to void an otherwise constitutional statute on the basis of statements made by a few representatives and warning that “[w]hat motivates one legislator to make a speech about a statute is not necessarily what

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*the State’s economic interests to ensure that the station is a reliable source of power.* 2008 Vt. Acts & Resolves No. 189, § 1(c) (emphasis added).

<sup>8</sup> See also, *Barquin v. Roman Catholic Diocese of Burlington, Vermont, Inc.*, 839 F.Supp. 275, 279 (D.Vt. 1993) (“a court interpreting a state statute must give effect to the intent of the Legislature, and should begin with the presumption that the plain, ordinary meaning of the statute is intended. *State v. Yudichak*, 147 Vt. 418, 420, 519 A.2d 1150 (1986). When the language is clear, a court should not look beyond the statute to determine a contrary legislative intent. *Cavanaugh v. Abbott Laboratories*, 145 Vt. 516, 529–30, 496 A.2d 154 (1985)”).

motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.”).

**III. Energy legislation enacted since 2005 and VNRC’s related testimony confirm that the express goals of Act 74 and Act 160 accurately reflect energy planning as a primary purpose for those statutes.**

During the past decade, the General Assembly has passed numerous statutes to transition Vermont’s energy portfolio towards greater reliance on renewable energy resources. Two examples of the clear goals in such energy planning legislation are Act 45 of 2009 and Act 47 of 2011. These two laws were enacted in response to advocacy by public interest groups such as VNRC and with the support of many Vermonters, and, in addition to numerous other statutes, implement the goals of Acts 74 and 160 to invest in renewable energy and assess practical alternatives to non-renewable nuclear power. Furthermore, Acts 45 and 47 were debated and enacted during the time period that the Legislature was facing the question of whether to authorize the PSB to review ENVY’s application for a CPG to operate after March 21, 2012. The unambiguous purposes of these statutes to increase Vermont’s use of renewable energy is further proof that the General Assembly was focused on energy planning, including planning the type of generating facilities to be located in Vermont, when it deliberated whether, and ultimately declined, to provide legislative authorization for the PSB to review ENVY’s CPG application. *Pacific Gas*, 461 U.S. at 212 (“States exercise their traditional authority over...the type of generating facilities to be licensed”).

Acts 45 and 47 provide additional persuasive evidence that the findings and legislative purposes in Acts 74 and 160 are not a pretext for some impermissible purpose. Instead, they accurately reflect the General Assembly’s ongoing priority to transition the State to electric generating facilities that use renewable energy.



**A. Act 45 - Vermont Energy Act of 2009**

Act 45 enacted the following provisions, including both legislative mandates and financial incentives, to continue implementing a comprehensive plan of expanding the use of renewable energy resources in Vermont.

- Amendments to the Sustainably Priced Energy Enterprise Development (SPEED) program to require PSB to issue standard offers for renewable energy plants sited in Vermont. 2009 Acts & Resolves No. 45 §§ 2 through 4a.
- Requirements that (1) the Public Service Board have a standard offer for renewable energy resources in effect by September 30, 2009, (2) all Vermont utilities purchase energy at standard offer prices, (3) *pricing must provide incentive for the rapid development of renewable energy*, and (4) the standard offer was capped at 2.2 megawatts (“MW”) per project and 50 MW statewide. *Id.* at § 4 (emphasis added).
- Requirement for federal stimulus funds to be deposited in the Clean Energy Development Fund (“CEDF”) to finance thermal energy and geothermal projects. *Id.* at § 5.
- Requirement that the Agency of Natural Resources (“ANR”) consider applications for environmentally responsible commercial wind development on state lands. *Id.* at § 8.

Johanna Miller, Energy Program Director for VNRC, testified before the Senate Natural Resources & Energy Committee on behalf of VNRC’s members in support of Act 45. Exhibit 1, Miller Declaration (September 1, 2011), ¶¶ 7-8. Her testimony was informed by her work with many of the approximately 75 (at that time) community energy groups and town coordinators that are part of the Vermont Energy & Climate Action Network (“VECAN”). *Id.* at ¶ 8. Ms. Miller worked closely with these committees to develop energy plans designed to facilitate the growth of renewable energy resources at the community level. *Id.* at ¶¶ 1-2,4. Relying on a “Deliberative Poll” commissioned by the Department of Public Service and conducted in 2007 (“DPS Poll”), she testified that a majority of Vermonters have overwhelmingly expressed their

support for expanding renewable development projects in Vermont. *Id.* at ¶ 9.<sup>9</sup> This information, showcasing the high percentages of support for renewable and local energy, provides additional evidence that members of the General Assembly have been passing energy legislation, including Acts 74 and 160, in response to their constituents strong support for transitioning to renewable energy, and that the stated purposes for such legislation - to implement that transition - accurately reflect the Legislature's intent.

Ms. Miller also presented the following testimony on specific provisions of Act 45.

- VNRC supported expansion of the SPEED program because it will help create stable, competitive pricing structures needed to facilitate the development of in-state renewable energy supplies;
- VNRC supported use of federal stimulus funds for thermal and geothermal resources as part of expansion of renewable energy innovation and generation for heating, thereby decreasing demand for electricity used for heating; and
- VNRC supported the requirements to create a process to explore the feasibility of appropriate siting of wind energy development on state lands.

*Id.* at ¶ 8.

The express language of Act 45, the strong support it received from VNRC and its members, the efforts of community energy groups throughout the State, and the overwhelming majority of Vermonters' support for renewable energy all illustrate a strong motivation driving the Legislature's collective focus on rapid development of renewable energy in Vermont. Act 45

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<sup>9</sup> The DPS Poll results were provided to the Department of Public Service in a document titled "Report on the Deliberative Poll on 'Vermont's Energy Future'", and prepared by Luskin, et al., Center for Deliberative Opinion Research, University of Texas at Austin. The results showed that:

- 90% of Vermonters support wind power;
- 74% of Vermonters strongly support wind power even if turbines are visible from their residences;
- 69% of Vermonters support producing electricity mostly or entirely inside Vermont; and
- 70% of Vermonters prefer electricity produced by smaller facilities spread across the state.

adds to the persuasive legislative evidence that energy planning with a focus on renewable resources was a primary purpose for the Legislature's enactment of Acts 74 and 160, and that those statutes are part of a clear pattern of legislative intent to swiftly transition to renewable resources.

**B. Act 47 - An Act Relating to the Vermont Energy Act of 2011**

Act 47, continuing the General Assembly's policy of promoting a rapid transition to an energy supply powered primarily by renewable energy resources, enacted the following provisions, including legislative mandates and financial incentives.

- Requirement to increase net metering capacity for individual systems and the cumulative capacity of all systems on the grid. 2011 Acts & Resolves No. 47 §§ 1-2.
- Amendment to the SPEED program to allow unused capacity from a standard offer to be available for existing small hydro-electric projects. *Id.* at §§ 6-10.
- Requirement to establish a baseload renewable power portfolio requirement to be met by an existing woody biomass plant. *Id.* at § 11.
- Amendment to existing law to allow municipalities to create special assessment districts, renamed property-assessed clean energy ("PACE") districts to fund efficiency and renewable energy improvements. *Id.* at §§ 18a-18j.

Ms. Miller testified before the House Natural Resources & Energy Committee in support of many of the Act 47's provisions. Exh. 1, Miller Decl. at ¶ 10. She again presented her testimony on behalf of VNRC and its members, recognized the efforts of many of the approximately 100 community energy groups (at that time), and reminded the House Committee members of the DPS Poll showing that a majority of Vermonters overwhelmingly support renewable energy. *Id.* at ¶ 11.

Ms. Miller also conveyed the following testimony on specific provisions of Act 47.

- VNRC supported requirements to revise and expand the net metering program;
- VNRC supported requirements to revise and expand the SPEED program; and

- VNRC supported requirements to allow the creation of PACE Districts.

Act 47, the strong support it received from public interest groups such as VNRC, and the efforts of community energy groups throughout the State provide further proof of the Legislature's overall motivation for its focus on rapid development of renewable energy in Vermont. Act 47 also adds to the large body of legislative evidence that energy planning with a focus on renewable resources was a primary purpose for the Legislature's enactment of Acts 74 and 160 to regulate nuclear power.

Acts 45 and 47 demonstrate that the Legislature was serious about promoting the development and deployment of renewable energy resources,<sup>10</sup> and reflect its related intent to implement that goal by requiring consideration of alternatives that "may better promote the general welfare" than nuclear power.<sup>11</sup> The General Assembly could not be more clear about its consistent intent to engage in energy planning by promoting and planning for the increased use of renewable energy technologies in Vermont. That intent, expressed and implemented in Acts

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<sup>10</sup> See 2005 Acts & Resolves No. 74 § 2 (Vermont Clean Energy Development Fund), as codified at Vt. State. Ann. tit. 10, § 6523(c).

<sup>11</sup> 2006 Acts & Resolves No. 160 § 4, as codified at Vt. State. Ann. tit. 30, § 254(b)(1)(C). Acts 45 and 47 are only two of numerous Vermont statutes that demonstrate the State's Legislative consistent priority to promote renewable energy. See e.g. Act 208 of 2006 (Energy Security and Reliability Act - mandates public engagement process focused on the State's energy supply choices starting in 2012, amends CPG for hydro, and expands use of Clean Energy Fund for line upgrades to facilitate power generated by farms, bio-fuels and biomass); Act 209 of 2008 (Energy Independence and Economic Prosperity - sets goal to use 50% of state's manure in methane digesters by 2028, *with an interim goal of 15% of cattle manure and 25% of poultry/non-dairy manure by 2012*, and requires ANR to revise rules to allow non-manure wastes in digesters) (emphasis added); Act 92 of 2008 (Vermont Energy and Affordability Act of - sets goal of 25% renewable energy by 2017); Act 159 of 2010 (Renewable Energy Act - allows net metering for National Guard and state military facilities of 2.2 MW or less, makes standard offer available to existing farms with methane digesters, and simplifies procedures for connecting small renewable energy plants to the grid);. See also Senate Bill S.289 (not passed) - referenced planning for State's energy future and giving electric utilities enough "time to develop and obtain renewable or other alternative electric energy sources" if VY closes on schedule in March 2012.



74 and 160, and further implemented in Acts 45 and 47, establishes that the State is engaging in the legitimate exercise of its traditional authority over nuclear power plants, and shows that ENVY's attempt to dispute that authority is without merit.<sup>12</sup> The overwhelming legislative evidence of that intent compels a decision by this Court that the State has the authority to phase out non-renewable energy supplies when planning for energy production within Vermont, and therefore the State's energy planning in Acts 74 and 160 is a permissible non-preempted purpose for phasing out a non-renewable power source such as ENVY's nuclear facility.

### **III. Conclusion**

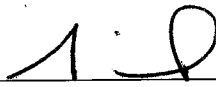
The statutes passed by the Vermont Legislature to promote renewable energy, and VNRC's support of those statutes, demonstrate that the Legislature was responding to VNRC's advocacy and the strong support of Vermonters for moving the State towards an energy supply primarily powered by renewable resources. Energy planning is an express purpose for the enactment of Acts 74 and 160, and the related energy legislation supported by Vermonters shows the Legislature's express purpose accurately reflects its intent. Therefore, VNRC respectfully requests this Court to hold that federal law does not preempt the regulation of nuclear power by Acts 74 and 160 or Vermont's exercise of its authority pursuant to those statutes.


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<sup>12</sup> See Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction, April 18, 2011, p. 23.

Respectfully submitted,

Date: September 2, 2011

  
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